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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1732

KALVAR CORPORATION, *Petitioner*

v.

THE UNITED STATES, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Claims

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PETITIONER'S REPLY MEMORANDUM

VALENTINE B. DEALE
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Petitioner
Kalvar Corporation

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. Respondent's Memorandum Would Sanction the Abuse by the Court of Claims of this Court's Decision in College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

Respondent's memorandum cites a statement by Mr. Justice Brandeis for the Court in *College Point Boat Corp.* as the basis for the line of cases in the Court of Claims which effectively transforms a breach of contract by the Government into a termination for the Government's convenience.[1] The cited quotation from Mr. Justice Brandeis is as follows:

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[1] Memorandum for the United States in Opposition (Resp. Memo), p. 3 at ftn. 4.

> "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudication, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later." *College Point Boat Corp.* v. *United States,* 267 U.S. 12, 15-16 (footnotes omitted).

In *College Point Boat Corp.,* the Navy Department shortly before the World War I Armistice entered into a supply contract under a Federal statute which granted the Navy an unconditional right to cancel the contract. Shortly after the Armistice, the Navy attempted and failed to obtain the contractor's consent to a mutual termination. The Navy had overlooked its right of cancellation under the Federal statute and never gave the notice requisite to terminate the contract. The contract itself did not contain a clause authorizing cancellation other than for default by the contractor, and there was no such default. In his contract damage suit before the Court of Claims, the contractor sought prospective profits, and in the course of that suit, the Navy's right of contract cancellation, under which prospective profits were not recoverable,[2] was at last asserted. This Court denied prospective profits to the contractor, holding that the right of cancellation was a continuing one which could be asserted anytime so long as delay in exercising the right did not bring about an inequitable result.

The previously quoted statement of Mr. Justice Brandeis was appropriate enough in the context of

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[2] See *Russell Motor Car Co.* v. *United States,* 261 U.S. 514 at 524 (1923).

the facts then before the Court. However, it is an abuse of Mr. Justice Brandeis' language and the Court's holding to suggest that they are a proper foundation for the decision by the Court below. The facts in *College Point Boat Corp.* and the facts in the present case are altogether different.

In *College Point Boat Corp.*, the contract contained no termination-for-Government's convenience clause but the Government did have an unconditional right of cancellation under a Federal statute and it actually asserted such right to terminate the contract, albeit belatedly. In the present case, there was no Federal statute authorizing termination of the subject contract by the Government, the contract did contain the standard termination-for-Government's convenience clause but the contracting officer made no move to exercise his authority under that clause. Further, in the former case, the contracting officer wanted to terminate the contract and strenuously tried to reach an agreement to that end with the contractor; in the present case, the contracting officer had no interest in terminating the contract and the contractor had no reason for supposing any such interest. Indeed, the Government in the present case bought supplies under the contract until the contract's expiration.

Additionally, by converting through legal fiction a breach of contract into a termination for convenience with no notice to petitioner, the opinion of the Court below and respondent's memorandum in support thereof would deny petitioner his contractual right of notice of termination [3] and would thereby foreclose his chance

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[3] Paragraph (a) of the "Termination for the Convenience of the Government" clause in petitioner's contract includes the fol-

of dealing realistically with the contract.[4] Such a position of dismissing the Government's obligation to give notice is in marked contrast to the position taken by this Court in *College Point Boat Corp.* when it found that there had been no contract cancellation prior to the beginning of the lawsuit in view of the fact that, "The Navy Department failed to give the notice requisite to terminate the contract."[5]

The fanciful legal theory of converting a breach of contract by the Government into a termination for the Government's convenience would effectively grant to the Government a license to breach contracts. This is all far beyond what Justice Brandeis and the Court had in mind in *College Point Boat Corp.*

2. Respondent's Memorandum Fails To Meet the Merits of Petitioner's Contentions that the Court Below Badly Misconceived the Meaning of "Bad Faith" and "Clear Abuse of Discretion" and that the Government's Conduct Was Marked by Both.

The issue of "bad faith" or "clear abuse of discretion" has relevance only in the context that a breach of contract by the Government must be regarded here as a termination for the Government's convenience.

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lowing sentence (Petition, pp. 22-23): "Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective."

Federal Procurement Regulations also provide, "Contracts shall be terminated for convenience only by written notice to the contractor . . ." 41 CFR 1-8.202 (copy at Petition, 46a).

[4] See Petition, pp. 25-26.

[5] *College Point Boat Corp.* v. *United States*, 267 U.S. 12 at 15.

Under that theory, since termination by the Government for its own convenience is open to challenge only in the event of the Government's bad faith or clear abuse of discretion,[6] the Government is suppose to be liable for breach of contract damages only in the event of its bad faith or clear abuse of discretion.

Accepting *arguendo* the legal fiction of constructive conversion of a breach of contract into a termination for the Government's convenience, petitioner emphasizes that respondent's memorandum is silent on the issue raised in the Petition for Writ of Certiorari that the Court below badly misconceived the meaning of "bad faith" and clear abuse of discretion".[7] Also, neither the opinion of the Court below nor respondent's memorandum fairly evaluated such examples of the Government's misconduct as follows:

First, General Services Administration (GSA) was indifferent to its obligation in fairness of securing technically sound film measurements pursuant to the standards of the applicable Federal Specification; in fact, with no capacity of its own for making such measurements and with no disposition for obtaining an objective determination, GSA chose to accept technically unsupported, arbitrary and obviously self-serving figures of a competing second supplier, which itself had no capacity for making the critical film measurements, and rejected out-of-hand petitioner's figures which had been derived on the basis of the standards of the Federal Specification.

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[6] Resp. Memo. p. 3 at ftn. 3.

[7] Petition, pp. 17-19.

Second, disregarding petitioner's position as the Government's primary source of supply contractor for certain film and evading the obligations and spirit of its contractual arrangement with petitioner, GSA deliberately withheld information from petitioner about one agency's special requirement for film which could have been handled under petitioner's primary source of supply contract.

Third, contrary to both the Scope of Contract and the Special Requirements provisions of the contract and related Federal regulations, GSA improperly created a second source of supply for all Government agencies on the basis that certain film from such source satisfied a particular requirement of one agency.[8]

Fourth, GSA's violations in themselves of Federal regulations pertaining to primary source of supply contracting and the use of Federal specifications are evidence of GSA's "bad faith" and "clear abuse of discretion."[9]

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[8] In his evaluation of petitioner's protest, the Comptroller General agreed with petitioner that a Government agency was not entitled to purchase film from the second supplier when petitioner's film could satisfy the Government agency's film need. To the extent that a Government agency did so purchase film from the second supplier, the Comptroller General held that petitioner was entitled to damages. Petition, p. 24a and p. 31a. Neither the opinion of the Court below nor respondent's memorandum dealt with this consideration.

[9] Petitioner's contention that GSA's violations of Federal regulations were evidence of GSA's "bad faith" and "clear abuse of discretion" was not discussed in the opinion of the Court below. The subject was referenced by respondent's memorandum only in one brief footnote, namely, footnote 6 at page 5. The comments there do not dilute petitioner's position (Petition, pp. 19-22).

3. When Respondent Makes the Point that the Government Was Not Required to Afford Petitioner the Opportunity to Supply Film OUTSIDE the Specifications of the Contract,[10] Respondent Misses the Thrust of Petitioner's Reasoning.

Petitioner insists that the combination of its position as the Government's primary source of supply for certain film and the contract schedule requirement for that film to be spec film, together with the mandate under Federal regulations[11] that Federal agencies should purchase spec items whenever possible, imposed upon the Government the clear duty of providing petitioner with the opportunity to supply film *within* the applicable Federal Specification to meet a special film requirement before looking to a second supplier for film *outside* the applicable specification to satisfy such requirement.

Rather than ascertaining whether its primary source of supply contractor could satisfy IRS' special operational need with fast film *within* the broad range of sensitometric characteristics prescribed by the Federal Specification, GSA wrongfully focused on the fact that a second supplier could satisfy IRS's special operational need with film which was thought to be *outside* the Federal Specifications.

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[10] Resp. memo, p. 4.

[11] 41 CFR 1, Federal Procurement Regulations § 1-1.305-1, -2 and -3 (Petition, pp. 43a-46a); 41 CFR 101, Federal Property Management Regulations § 101-29.203, -204, and -205 (Petition, pp. 40a-42a).

CONCLUSION

The basis for respondent's opposition to the petition is without merit. The petition ought to be granted in the interest of fair relations between the Government and its private suppliers. The ill-advised precedent of the Court of Claims with its unwarranted bias favoring the Government ought to be set aside. The principle of fairness to private suppliers whose contracts are breached by the Government deserves to be upheld.

Respectfully submitted,

VALENTINE B. DEALE
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Petitioner
Kalvar Corporation